LAW OFFICES OF
HERBERT BEIGEL

38327 S. Arroyo Way
Tucson, Arizona 85739

Office: 520-825-1995
Cellular: 520-869-5836
Facsimile: 520-844-6215
E-mail: hbeigel@gmail.com

767 Fifth Avenue #4700
New York, New York 10153

Herbert Beigel admitted:
Arizona, New York
District of Columbia
Illinois

January 22, 2015

Via S.D.N.Y. E-Filing and E-mail

The Honorable Richard J. Sullivan
U.S. District Court for the
Southern District of New York
40 Foley Square
New York, New York 10007

Re: CVR Energy, Inc. v. Wachtell, Lipton, Rosen & Katz et al. (C.A. No. 14 cv 06566)

Dear Judge Sullivan:

I am lead counsel for Plaintiff (or "CVR") in the above-captioned action, and I am writing to inform Your Honor of recent developments in the litigation subsequently brought against CVR by Defendant Wachtell in New York State court and which is pending before Justice O. Peter Sherwood.

Please be advised that, notwithstanding this Court's December 30, 2014 decision denying Wachtell's motion to dismiss or stay on the basis of abstention, Justice Sherwood scheduled and heard oral argument on Wachtell's motion to dismiss CVR's malpractice counterclaim (a mirror image of this earlier-filed action) on January 14, 2015 (a copy of which is attached). And, following that hearing, Wachtell has continued to press Judge Sherwood into deciding its motion quickly. We, however, continue to believe that this matter should be litigated in Your Honor's court, and also enclose a copy of the correspondence the parties transmitted today to Justice Sherwood.

Respectfully submitted,

/s/ Herbert Beigel

cc: James Sottile, Esq. (Defendants' counsel, via ECF)
Paul Shechtman, Esq. (Defendants' counsel, via ECF)
Robert R. Viducich, Esq. (co-counsel, via ECF)

Attachment

(January 14, 2015 Oral Argument Transcript and

January 22, 2015 Correspondence to Justice O. Peter Sherwood)

SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY: CIVIL TERM: PART 49

----------X

WACHTELL, LIPTON, ROSEN & KATZ, : Index No. 654343/2013

Plaintiff(s). :

-against- :

CVR ENERGY, INC.; ICAHN ENTERPRISES, L.P.; ICAHN ENTERPRISES HOLDINGS L.P.; and CARL C. ICAHN, :

Defendant(s). :

----------X

60 Centre Street
New York, New York 10007

January 14, 2015

B E F O R E:

THE HONORABLE O. PETER SHERWOOD, Justice

A P P E A R A N C E S:

ZUCKERMAN SPAEDER LLP
Attorneys for the Plaintiff
399 Park Avenue 14th Floor
New York, NY 10022
By: PAUL SHECHTMAN, ESQ.
JAMES SOTTILE, ESQ.
-and-
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
By: WILLIAM SAVITT, ESQ.

A P P E A R A N C E S (Cont'd):

LAW OFFICES OF HERBERT BEIGEL
Attorneys for the Defendants
38327 S. Arroyo Way
Tucson, Arizona 85739
-and-
767 Fifth Avenue #4700
New York, NY 10153
By: HERBERT BEIGEL, ESQ.
-and-
ROBERT R. VIDUCICH, ESQ.
40 Wall Street 28th Floor
New York, NY 10005

JEANETTE LAKE-MASON, CSR, RMR
Official Court Reporter

Proceedings

(Whereupon, the following takes place in open court, in the presence of the Court, Mr. Shechtman, Mr. Sottile, Mr. Savitt, Mr. Beigel, and Mr. Viducich:)

THE CLERK: Calling case number one on the Part 49 calendar, in the matter of Wachtell v. CVR, index number 654343 of 2013.

Your appearances for the record, please.

MR. SHECHTMAN: Judge, Paul Shechtman, for Wachtell, Lipton. With me from the Zuckerman firm is Jim Sottile; and from the Wachtell, Lipton firm, Bill Savitt.

Good afternoon, your Honor.

MR. BEIGEL: Good afternoon, your Honor. Herbert Beigel, for the defendants, with my colleague Robert Viducich.

THE COURT: I assume that you will ask -- you will be arguing for Wachtell, Mr. Shechtman.

MR. SHECHTMAN: I will, your Honor.

THE COURT: And, Mr. Beigel, you will be arguing on behalf of CVR?

MR. BEIGEL: That's correct.

THE COURT: Mr. Shechtman, is there anything you're going to tell me this afternoon that's not already in your papers? Because if there's not, I'd like to spend some time with Mr. Beigel.

MR. SHECHTMAN: I worked so hard to prepare, Judge, I wish I could answer that question by saying that there's --

THE COURT: All right, you want to argue. Go ahead.

MR. SHECHTMAN: No; but in all seriousness, I think the papers are quite good, and I think they state the argument. I think it's a straightforward argument.

THE COURT: Papers on both sides are very good.

MR. SHECHTMAN: If you will give me a chance to reply if there is anything being said, I'm happy to defer.

THE COURT: Do you have any problem with that, Mr. Beigel?

MR. BEIGEL: Not at all, Judge.

THE COURT: Good. Well, why don't we start with you then.

MR. BEIGEL: Your Honor, if you're -- I'd appreciate if you allow me to sit because I have a back problem.

THE COURT: Whatever makes you comfortable, sir.

MR. BEIGEL: Well, these days not too much, but I appreciate it.

THE COURT: Well, whatever makes you less comfortable, or more comfortable than not, less uncomfortable.

MR. BEIGEL: Thank you, your Honor.

THE COURT: All right. It's not a problem at all.

All right. So this is a motion to dismiss your counterclaims in which, I gather, you're seeking to avoid the fees that Wachtell is seeking; and also you want to recover whatever fees may be awarded against your client by the banks.

MR. BEIGEL: Those are the two monetary prayers.

THE COURT: That's the focus of your counterclaim.

MR. BEIGEL: Right, although not in that order.

THE COURT: Pardon.

MR. BEIGEL: Not necessarily in that order of priority.

THE COURT: What difference does it make?

MR. BEIGEL: It doesn't make a difference. I just wanted to -- you know, context is always useful.

THE COURT: And I think you're right. And among the things that are part of the context for this afternoon is the fact that this Court has looked at, at least an aspect of this transaction and the controversy that has flowed after it and made a decision; and that case is on appeal.

Has the appeal been perfected?

MR. BEIGEL: Well, no. By agreement with the banks as part of the judgment that was entered, we will be perfecting the appeal on or before February 20.

THE COURT: All right. So I guess that puts us out to where, maybe May for a decision?

MR. BEIGEL: May term. Well, let's see. Unless the banks request an extension, the argument would probably be in the late April or early May.

THE COURT: Right.

MR. BEIGEL: And then typically, in my experience, the First Department takes approximately three months to render its decisions.

THE COURT: This is probably a question more appropriate for Mr. Shechtman, but I'll ask you.

Given that circumstance, is there any urgency for the Court to do anything on this motion?

MR. BEIGEL: There isn't. And if I may just say, there are other circumstances which I think are relevant to the lack of urgency, if I may just --

THE COURT: I mean, is something going on across the street?

MR. BEIGEL: Not just that. There is something going on across the street, but there is another factor.

THE COURT: Yes, so I noticed.

MR. BEIGEL: Excuse me.

THE COURT: So I noticed.

MR. BEIGEL: Yes. Well, it's hard not to notice.

I don't want to bore your Honor with things you're already familiar with, but there -- in addition to the fact that there's no urgency, for the reason you just stated, if you recall, after we filed, we being CVR, filed its claim in federal court in Kansas, the declaratory judgment was filed here; and we moved to dismiss count one under the CPLR provision that's commonly referred to as the first to file rule.

The Court denied that motion that we filed on the basis of efficiency, your familiarity with the bank litigation; but more significantly, the denial occurred at a time when no one was absolutely certain the case would continue in federal court. As you know, Wachtell then filed its motion to abstain under the Colorado River Doctrine which Judge Sullivan recently denied. So the landscaped has changed.

Second, the discovery in this case has gone forward, and it's totally coordinated. In fact, the deadlines before this court and the federal court are the same. And cons -- and discovery cutoff because there was some problem with scheduling depositions, has now been extended from early February to I think late February. Might be off a little bit on that. But the bottom line is,

given the size of the case, the parties are moving forward very efficiently because we're not talking about one or two depositions. There have already been five depositions; and in the next -- there's another set of depositions Friday of the general counsel of CVR, and then in two weeks there's another five or six depositions. There have been hundreds of thousands, in fact -- well, I'll leave it at that -- hundreds of thousands of documents produced.

I recognize that Wachtell had a right to file a motion to dismiss, but there's going to be a very significant substantial record submitted in this case. In addition, there is a schedule contemplates expert designations. We intend to designate our experts early before the deadline. And, frankly, your Honor, while one can't assume anything, it's certainly a reasonable likelihood that we would ask this Court's permission to supplement our papers with any matters in the fashion of a letter that might relate to their collateral estoppel motion, and frankly, regardless of how the Court rules, so there could be a complete record on appeal.

So I think all of those reasons and the fact -- there's one other fact. It's not just that there's a federal case; but in their reply brief before your Honor Wachtell said that if you were to deny their motion, they intend to proceed with the exact same motion in federal

court. Wachtell just filed their Answer to the federal Complaint yesterday, and their first affirmative defense is the collateral estoppel defense. And, again, because the timing of both cases is the same, there's just no rush to do any of this. And, frankly, you know, it would be -- we filed a notice of appeal on your denial of the motion to stay as well. So whether that ends up, we end up actually perfecting that appeal I think depends on what happens, who does what. This is a very unusual situation. But these are all of the reasons why I think from the point of view of context and practicality and the fact the parties are not sitting around doing nothing and the depositions are half done, that the Court simply --

THE COURT: Mr. Beigel, I will come back to you a minute. Let me just ask the same question of Mr. Shechtman.

I think I have a suspicion I know what your answer is, but --

MR. SHECHTMAN: My answer on this one is pretty simple. This is a collateral estoppel law. You've found ratification. You've also found unambiguity.

THE COURT: I will get back to him on that subject.

MR. SHECHTMAN: But once you found ratification, the answer is, obviously, that they knew the material terms

of this agreement.

When you have a malpractice claim that says you didn't tell them, it doesn't matter if you didn't tell them, you don't have causation. So you have a complete answer here. The record can't get better, right? Ratification finding ends this.

And so the question becomes why wait. Two things happen if you wait. Expenses, right. The five, six --

THE COURT: I sense from what Mr. Beigel is saying to me that those expenses are going to mount anyway --

MR. SHECHTMAN: Not true --

THE COURT: -- because --

MR. SHECHTMAN: -- respectfully.

THE COURT: -- because you are proceeding in more than one forum.

MR. SHECHTMAN: I promise you the following: If you were to estop today, we would be in that forum tomorrow, right; and I think they'd be compelled to estop because of collateral estoppel, indeed, in that case because of res judicata. It's the same parties, same issues. So there's no reason to think there's going to be any --

THE COURT: So all that says to me is that all roads lead to 25th Street, at the end of the day, all roads

lead to 25th Street.

MR. SHECHTMAN: Oh, I think that's totally right; and, and I think that's one of the reasons that one has in this state a very sensible rule that says the pendency of an appeal from your prior ruling doesn't affect the application of estoppel because all roads lead there. They will get there. If they get a reversal, then presumably, all roads lead maybe back here or somewhere else, but --

THE COURT: That's what I was afraid of.

MR. SHECHTMAN: I, I, I don't think, I don't think -- as much of a pleasure it is, I don't think we're going to get back, right.

And if you say to yourself what's urgency, the opposite side of the question is what's the non-urgency because you're going to have additional depositions, you're going to have experts, all of which are unnecessary if your finding is right; and on top of that, anything else leads to widely inconsistent outcomes. You could say, well, they ratified, but they are guilty or liable.

THE COURT: Let's assume that I were to say, okay, I was to essentially follow what I did earlier with respect to the banks and you go across the street.

Do you really think that Judge Sullivan is going to do anything different other than take his sweet old time --

MR. SHECHTMAN: My experience --

THE COURT: -- and get us past May?

MR. SHECHTMAN: I just want to say my experience with Judge Sullivan is his sweet old time is usually two weeks. He moves rapidly, as does the Court.

I mean, this motion was submitted --

THE COURT: I know.

MR. SHECHTMAN: -- a few weeks. So this is going to get itself resolved. And if you said if we got over there, is there any answer other than res judicata, there isn't; you can't allow that inconsistency to exist.

So the answer to the question of urgency is if your finding is right, and it's right, but in any event, it's binding, they've had a full and fair opportunity to litigate, if it's right, then we should just move to 25th Street; and, presumably, it's as quickly as we can.

THE COURT: Okay. You can comment on that briefly, if you wish, Mr. Beigel; but I do want to get into this collateral estoppel question.

MR. BEIGEL: Just very briefly, it's -- you can say these things two sides of the same coin with respect to urgency, except for the fact once there really is no urgency, and it strikes me, listening to Mr. --

THE COURT: Well, Mr. Shechtman says that it's costly, money.

MR. BEIGEL: Well, there's the rub, Judge. Of all the depositions that I'm going to take, there's exactly one on count one. The rest are on count --

THE COURT: There's only one on one?

MR. BEIGEL: Count one, the malpractice count. Everything else is on counts two and three.

Now, I'm not going to speak for them, but they've already taken a few depositions, most of which has nothing to do with malpractice, has everything to do with their counts two and three. They're going to take additional depositions. It's not as if depositions would be over tomorrow.

The second thing is that their whole idea about expense presupposes that you can and should and would decide their motion today, which in a case like this I am sure the Court is going to take a prudent amount of time to decide what is a very significant issue.

The bottom line is that the idea that they'll go across the street and Judge Sullivan will not explore the urgency issue the same way you're doing, and they're assuming that Judge Sullivan will say, well -- in other words, the question is why not wait; and the only thing I hear is it cost us money; but you know what, you've decided the banks' summary judgment months ago. They could have moved for a stay of discovery if they had so much

confidence in their motion. They didn't. In fact, they've pushed harder and aggressively for a tight schedule to complete discovery. And I think frankly, honestly -- just my opinion -- it's a little disingenuous to now come before the Court and say hurry up and decide, your Honor, because we're, it's expensive to do depositions.

THE COURT: All right, okay. Well, let me hear what you have to say on this collateral estoppel question.

MR. BEIGEL: There's a lot of arguments that went back and forth in briefs; and I think that the con -- an important concept is important to emphasize; and that is, let's just assume for the moment that your decision on ratification was right as a matter of law and that issue can't be re-litigated.

A long time ago, my first class of law school, I learned the most important lesson I've ever learned as a lawyer, which is,you can read an opinion and it makes perfect sense and it's totally logical, but the premise is wrong. And there's a flawed premise here.

The issue that really has to be litigated in this case is proximate cause; so even if we were to assume that you are correct that in finding ratification it can't be re-litigated, there remains a very important question to which collateral estoppel can't apply. Did Wachtell, Lipton proximately cause damage through alleged

professional negligence by procuring the ratification that your Honor found. That's a proximate cause issue.

They may have, at the appropriate time, a motion for summary judgment that the conduct of CVR has interrupted the proximate cause. They might have a motion on that, they might have grounds for that; but it's not a collateral estoppel motion. So even if this Court ruled that we cannot re-litigate ratification or the Appellate First Department affirms your Honor's ruling on that basis, there is still a malpractice case here; and --

THE COURT: Is it fair to characterize the counterclaims as one which alleges malpractice based on the second engagement letter, as opposed to --

MR. BEIGEL: As opposed to what?

THE COURT: -- something else? Is there more to it than that?

MR. BEIGEL: Yes.

THE COURT: Okay.

MR. BEIGEL: There is more to it. And this is why collateral es -- the burden is not on us on collateral estoppel, it's on the plaintiff.

Your Honor never mentioned a word in your opinion with respect to whether or not any misadvise, bad advice, or other negligent behavior by Wachtell would constitute a defense to the bank action, never mentioned it. Your Honor

never --

THE COURT: You mean on the -- with respect to --

MR. BEIGEL: Ratification.

THE COURT: -- a pre-- the pre-ratification conduct?

MR. BEIGEL: Right. As a matter of fact, you went out of your way to say an opinion, and I think based upon the way you approached the decision is correct, you said because I find ratification, I don't have to decide any of those other issues, including the alleged lack of authority.

Your Honor, one of the things that I found fascinating in Wachtell's brief is they made the comment that if Wachtell wrongfully procured the ratification for example, then you couldn't have granted summary judgment for the banks. That's not correct.

It's interesting that in the context of other cases, if you'll recall from the briefs, there were two cases which we cited that Wachtell attempted to distinguish where lawyers supposedly handled a trial negligently and there was an adverse ruling by that court. Notwithstanding that, the court allowed a malpractice claim to go against the lawyers.

Now, what Wachtell said in their brief to that, oh, that's a different situation because the plaintiff was

suing the lawyer who represented the same lawyer who's the defendant in the malpractice case; but Wachtell misses the point. The point is those cases were decided adversely to the plaintiff, that's why they're going after the lawyer.

The fact that the court adversely decided against the plaintiff did not foreclose suing the lawyer. You know why? Because the issue is proximate cause. Did the lawyer's negligent behavior, whether it's in a trial, as in those cases, or here in representing, advising CVR, was that conduct the proximate cause of the alleged damage to the plaintiff. That's not a ratification issue.

And then, finally, I'll say the other --

THE COURT: And it's not because of what?

MR. BEIGEL: The issue of whether or not -- I'm sorry.

THE COURT: So malpractice occurs in the first instance pre-ratification.

MR. BEIGEL: Okay.

THE COURT: The malpractice, if you will, I'm using, I'm assuming malpractice occurred.

MR. BEIGEL: Okay, I'll go along with that.

THE COURT: I'm assuming that, an assumption.

MR. BEIGEL: Yes.

THE COURT: Comes to the attention of the board, and they decided to proceed and ratify the actions of its

counsel. Why doesn't that render this proximate cause claim that you have --

MR. BEIGEL: Well --

THE COURT: -- beside the point?

MR. BEIGEL: That -- the reason is because two reasons. One is there's nothing in your opinion to suggest that you concluded that the malpractice was brought to the attention of the board. All that you found was the following: You said that shortly after the resolution was --

THE COURT: Let me put it just slightly differently.

MR. BEIGEL: Okay.

THE COURT: That all of the facts necessary to allow the board to reach a conclusion with respect to whether or not it was adequately represented were available to it at the time that it ratified. Let me get away from the assumption that it --

MR. BEIGEL: Okay.

THE COURT: -- that it reached that conclusion.

MR. BEIGEL: And let me respond to that, if I may.

THE COURT: All right.

MR. BEIGEL: Let's take your assumption and the board sits there and says to themselves I can't believe we

have this agreement that was signed, I can't believe, but we signed, but it's signed, and we're stuck with it, we're stuck with it; so we have no choice, but to pay the banks.

THE COURT: Well those aren't the facts that are alleged here. That's for sure.

MR. BEIGEL: Well, but the point here is collateral estoppel.

All you said was that the board, knowing what the fees were, passed the resolution; but if the, if the point is -- but the point can't be that you cannot sue the lawyers who procured that resolution because you're now making an assumption that's nowhere to be found in your opinion. And in fact, if you had put that in your opinion, you would be finding something which you never found, which is that Wachtell, Wachtell's negligent procurement of the resolution is somehow a defense.

In fact, one of the comments you made in your opinion was, again, when you're not addressed -- think about -- let's think about it this way. The law of collateral estoppel is it has to be necessary to the decision in order for there to be issue of preclusion. It wasn't necessary to your decision to find that Wachtell did or did not negligently procure the resolution. As I said at the outset of my comments, I don't doubt that at some point in time Wachtell will argue that there's no proximate

cause; but collateral issue is a special, a special doctrine that is not a proximate cause doctrine. It's the doctrine to avoid re-litigating an issue. It doesn't foreclose you from at the appropriate time ruling on a motion for summary judgment that because of the ratification there is no claim of proximate cause. That's not the same kind of decision as you finding that the issue has already been litigated.

Now, I don't happen to agree, when we get to the appropriate time, that Wachtell -- that we can't satisfy proximate cause for a lot of reasons that aren't in the record. And I'll just give an example of why it's important not to apply collateral estoppel here because the record that your Honor relied on for collateral estoppel is woefully incomplete with respect to the proximate cause.

In the couple of days before the resolution was -- and it's just an anecdotal example, there's a lot more. In a couple of days before the resolution was submitted to the board, Wachtell on a Saturday night until midnight tried to figure out what the engagement letters said the fees would be; and the four lawyers at Wachtell couldn't agree. They finally came to a consensus that the enterprise of devalued fee would be owed, and they put together a chart that showed that. They then went to the meeting with CVR, submitted 20 to 30 resolutions, all of

which were boilerplate, without ever disclosing that Wachtell itself had trouble figuring out what the fees were.

This allegation of procuring, wrongfully procuring the resolution is significant.

Secondly, what isn't in the record and your Honor didn't consider in the ratification issue is while it's correct there was no formal revocation of the resolution, the fact is there was no invoice at the time of the resolution. The invoice came several days later; and immediately the facts would show CVR told the banks that it didn't believe it owed the money and was reviewing to see if it had any defenses. So there was a revocation by conduct. But your Honor's opinion doesn't say there was only ratification because there was no formal revocation; that was an additional thing you mentioned, which I would categorize as dictum. What was the key to your decision is that the simple approval of the resolution when the board knew what the fees were an hour or two after it constitutes ratification. That's not -- does not collaterally estop a claim against CVR's lawyers any more than if a lawyer for a client makes mistakes in litigation it forecloses, under the two cases we cited, the plaintiff's ability to go forward.

THE COURT: Okay. Well, what about the impact

of, I guess, the second engagement letter?

MR. BEIGEL: Impact in what regard, your Honor?

Oh, may I just mention one other thing --

THE COURT: I'm sorry, yes.

MR. BEIGEL: That I forgot to mention?

It's interesting -- and also this is not addressed in the Court's opinion, in your opinions with respect to the summary judgment -- that when the invoices in fact came the 1st or 2nd of May, the CEO Jack Lapinski called up Wachtell and said we got these invoices, what should we do; and Wachtell responded go find yourself some other lawyer, we're done.

THE COURT: All right. What I was referring to is I think I recall in, it is the second argument by Wachtell, separate and apart from the collateral estoppel, that there's a second engagement letter in which the fees provisions are pretty straightforward.

MR. BEIGEL: Well, this whole dispute is about the second engagement letters, but I'm not sure I understand the point of the --

THE COURT: I thought there was a separate argument they made.

MR. BEIGEL: Oh, yeah. The separate argument is twofold. Well, I think what you're referring to is their argument that the second engage -- to abrogate the second

engagement letters would have required an illegal fee arrangement with the banks because it would have incentivized the banks to not do a deal with Icahn. That argument is just wrong, and I can explain why if you'd like.

The reason the argument's wrong is that any contingency type arrangement creates an incentive obviously. If you say you're going to pay somebody for a certain result, that's an incentive, no matter what you do. Nothing in our Complaint against Wachtell, and, frankly, nothing in our Goldman Sachs, Deutsche Bank litigation ever suggests that we -- that the client is trying to get a different fee arrangement that would itself be a negative incentive. The fact is, the original engagements between the banks and CVR was not a contingency. It was a flat fee for services. There's nothing unlawful had the second engagement letters been a flat fee as well. So this whole argument that somehow --

THE COURT: But if you cut a deal for having a, you know, have a, either a contingent fee agreement or some other agreement as to fees which is clear in its terms --

MR. BEIGEL: Oh, that's their ambiguity argument.

THE COURT: Right.

MR. BEIGEL: But, but here's the problem with their ambiguity argument. What's necessary to your

decision is ratification, which is why you didn't formally -- you didn't decide the authority issue. No matter how clear the agreement was -- let's just assume that our arguments about ambiguity are wrong, that the agreement's clear -- you never decided whether the lack of authority was a defense because you said I don't have to decide that because I find ratification. Even assuming that the agreements are clear -- I'm not trying to reargue that with your Honor -- assuming the agreements are clear, that doesn't add anything to their motion to dismiss because the sole basis for collateral estoppel is that there's the ratification.

Let's assume they don't have collateral estoppel; so they say, well, you should dismiss anyway because the agreements are clear. What about the lack of authority? You never decided that. You'd have to decide that here.

THE COURT: Okay, all right.

Let me hear from you, Mr. Shechtman.

MR. SHECHTMAN: Can I do it standing up, Judge?

THE COURT: Any -- same thing I said to Mr. Beigel applies to you. Whatever makes you comfortable, so long as I can see you and hear you.

MR. SHECHTMAN: That sounds good.

THE COURT: That's what counts.

MR. SHECHTMAN: We, we, we agreed on one thing,

Mr. Beigel and I; and that is, that the issue here sounds in proximate cause; and that's the extent of the agreement.

And so if you say to yourself what is the negligence, the malpractice that's claimed against us -- and I don't know if you have a ready copy of the counterclaim in front of you, Judge.

THE COURT: Yep.

MR. SHECHTMAN: But if you turn to the back of it, this is sort of the simplest place to find it; and I think it is page 26 which is sort of summarizing the malpractice claim.

THE COURT: Paragraph 44?

MR. SHECHTMAN: Paragraph 44. So you look at A., right; and A. tells you that Wachtell sinned because it didn't tell CVR what the terms of those agreements are. B. says it even clearer, never advised. C. Never communicated. D. Failed to explain. E. Failed to explain. F., which is a, I think one says a calumny, is falsified the minutes; but it's irrelevant, it doesn't matter whether the minutes are false or not; it's not part of this story since the question here is what did they know.
G. Presented without a resolution, without disclosing. Right? H. Failed to represent the interests. That I assume is a, somehow is sort of a general summary. And then, I., we washed our hands because when it was over, we

told them it's over. That can't be malpractice. So A, B, C, D, E, F, G, H, every one of those is we failed to disclose; that's what this case is about, it's what it's about from the get go.

So now you say to yourself the following: You have made a finding, right. You have made a finding that they knew the material terms. At that point, there cannot be proximate cause that our failure to disclose caused any problems. We think we disclosed, we think that's what the record will show. But who cares? Right? If they knew the material terms, then by definition you can't have proximate cause. You can't ground a malpractice claim for a lawyer for failing to disclose something the client knew.

And I failed Mr. Savitt in the following way: I promised that within one minute of standing up I would say Schwartz, and I failed him. But Schwartz is the First Department case, and it is a 1994 case, and it is directly on point. It is this issue. It is going after lawyers for failing to disclose what you knew. And the First Department says you can't do that because you can't meet the second element of a malpractice claim, which is proximate cause.

So we're in agreement that this is proximate cause, and we're not in agreement -- I mean, Mr. Beigel keeps using the words "we negligently procured

ratification." I don't know what that means; but if it meant that we misled them affirmatively, right, then I suppose this goes forward. But what the Complaint says over and over again -- and I just read you the summary paragraph, I commend to you the 13 paragraphs before it -- failed to disclose, failed to disclose, failed to disclose.

You have a Court of Appeals case, Bishop v. Maurer, which says -- and it does it in the context of unanimity, but at the end of the day these arguments are similar -- The complaint here is devoid of any non-conclusory allegation that incorrect advice was given.

One could take one word out of that. It says is devoid of any non-conclusory allegation. This Complaint is devoid of any allegation. Right? This is a case in which the gist of it from beginning to end, I don't know what a stronger word than "gist" is, all of this is about you failed to tell us, when you found they knew. Right?

Now, whether you come at this as a ratification case or you come at it as an unambiguous case, if it's unambiguous, the case law is simple. If it's unambiguous and you sign an agreement, you can get out of it if your lawyer misled you or if you're incompetent. Right?

Whatever else is true of the client here, it's not incompetent. And there's no non-conclusory allegation

of misleading because there's no allegation of misleading.

So however you do this, the answer is it's a proximate cause case, and you've made the finding. You found that they knew, and that means game over. And he's told totally, right, there are cases, Avon, Houraney, if I say it right, that make sense. Your lawyer stands up and your lawyer bungles a case and you try and you lose and you sue your lawyer for malpractice and the question is, is it collateral estoppel.

How in God's name could it be collateral estoppel, right? You're suing for bungling the trial that you lost. But to sue a lawyer for not disclosing what you knew, by definition by Schwartz, can't be malpractice. And that's what this Complaint is about, and that's what our motion is about.

So I'm trying to think if there's anything more I should, I should say.

THE COURT: Before you sit down, would you comment in a sentence or two on the first thing that Mr. Beigel talked about going back to the first question I asked, which has to do with --

MR. SHECHTMAN: Urgency.

THE COURT: -- with going on, First Department. He says, look, you know, it's not -- this case is going to go on anyway.

MR. SHECHTMAN: You know, it's weird. He was arguing, Judge, in the followings sense: If you said to yourself in any case in which somebody makes a collateral estoppel argument, right, that's a winner -- and this, for the reasons I say, is a winner -- somebody could say what's urgency, let's just play it out, right? And, presumably, the answer to that is if we played it out, the best that could happen is we'd have inconsistent verdicts, and we can't allow that, right; and if we played it out, it would cost. So the notion that there is some --

THE COURT: It's the cost issue that I'm really focusing on, Mr. Shechtman. That's really my question.

MR. SHECHTMAN: Well, look, you have cost in the following way. You have --

THE COURT: Because I am sitting here assuming that, you know, by the time the middle blooming daffodils come out or tulips, we will know what the Second Department -- First Department thinks.

But what Mr. Beigel says is either way, the discovery that you're going through -- my deciding this is not going to materially reduce the costs.

Isn't that basically what you said?

MR. SHECHTMAN: Where do we go next?

MR. BEIGEL: Uh --

MR. SHECHTMAN: Excuse me.

MR. BEIGEL: I thought the Judge was looking at me.

THE COURT: I was asking him a question.

MR. BEIGEL: Oh. You were looking at me.

THE COURT: Yes, I was. I was asking you a question.

MR. SHECHTMAN: Oh, I apologize.

MR. BEIGEL: Yes, your Honor, because the fact is --

THE COURT: That's all I wanted.

MR. BEIGEL: -- there's --

MR. SHECHTMAN: Let me say the following: Where do we go next, right?

We complete depositions. Now, Mr. Beigel started by saying that's important here because we're going to create a record that's different than the first case. Well, obviously, you can't do that because that's why you have collateral estoppel. You had a full and fair opportunity. Right?

But the next thing he says is, well, it's just one witness, right, so presumably it's not much of a record we're creating.

But on top of that, where do we go next? We'd come back with a summary judgment motion. The summary judgment motion, I take it, is basically this motion,

right, maybe with some more facts, maybe not; but I don't think you could come out differently. You'd have to find that they knew. You found that they knew.

And then what do we do? We'd go over to federal court. I guess we could make this motion in federal court, right, and say we move to dismiss; or we could do it as a summary judgment motion. And that's a lot of resources, it's lot of your resources, it's a lot of our resources, on a question which is a simple one, right; assuming they didn't tell them, did it matter if they knew. And you can't escape that they knew because that's your finding. You can't have ratification.

I mean, Judge, here is the last page, if I can find it, the last page of Mr. Beigel's brief on this issue; and I won't pass it up to the Court, I'll just read it to you. And if I can hand it up, and maybe I could hand it up and make it easier for you if you want, Judge.

THE COURT: No.

MR. SHECHTMAN: And it's page 14 of his brief. And, Judge, while you're looking, I'll say just one more thing on cost.

THE COURT: This is page 14?

MR. SHECHTMAN: Page 14 of their brief.

THE COURT: The first full paragraph begins with the words "in any event"?

MR. SHECHTMAN: Yeah. And look at the last four words, five words, 10 words. As it was never even made aware of the second engagement letters. Right?

Like, pardon me. We have a finding that it was aware of every material fact; so it's -- if that's the conclusion of this argument, that they weren't aware, you can't possibly get there unless you're going to say you got it wrong before, which is the inconsistency that collateral estoppel meant.

The last thing I just say in terms of urgency, down the road here are experts and expert depositions. And the one thing I've known -- I once testified in this court as an expert -- You can do well as an expert in a court. It's expensive and it's time consuming and it's preparation. And all of that's unnecessary in a situation where the answer is they knew; and if they knew, by definition, can't be proximate cause.

THE COURT: Thank you.

MR. BEIGEL: Your Honor, may I briefly comment, if you don't mind.

THE COURT: Emphasis on the word "briefly."

MR. BEIGEL: It will be brief.

THE COURT: All right.

MR. BEIGEL: Again, two completely false premises. First, the Schwartz case. Their own quote, He

entered into the agreement, that is the defendant to be collaterally estopped, knowing the benefits which were to be accorded.

He's confusing the knowledge of the board for purposes of ratification with the knowledge of the board and CVR at the time the agreement was entered into two months before. The Schwartz case doesn't support his position at all. That's number one.

Number two, as to this whole business of urgency, I have to shake my head. There's a reason why there's no automatic stay of discovery pending a motion to dismiss.

THE COURT: Okay. You made that argument before.

MR. BEIGEL: No, no. But, but --

THE COURT: You actually did make that argument before.

MR. BEIGEL: Well, then my memory is going. It's not just my back, Judge.

THE COURT: All right.

MR. SHECHTMAN: I just -- I'm fine. Thank the Court.

THE COURT: I will consider the arguments that you've made and give you a decision. Hopefully, I'll be able to do it relatively quickly.

Thank you very much.

MR. SHECHTMAN: We thank the Court.

Oh, Judge, can we just take literally two minutes of your time on other matters?

I promise it won't be long. If you say no, it's okay.

THE COURT: Does this have to be on the record?

MR. SHECHTMAN: No.

MR. BEIGEL: I'd like it to be on the record, Judge.

THE COURT: Fine.

MR. SHECHTMAN: And I'll just -- just to say the following: We've sent you a letter. Mr. Beigel and I obviously disagree on this. I think his conduct in these depositions has been obstructionist. We're not asking for any relief. We're just saying that if it continues, we're likely to come back. And we gave you that just so when we come back, you know that we're trying. That's one.

Two is we had an order to show cause before you related to the Friedman Kaplan advice. Friedman Kaplan found it wouldn't go forward, thought it would be ratification and unambiguous. We're going to ask witnesses about it on Friday. That's agreed upon by the stipulation. We're also going to -- we have Mr. Gross, who's counsel. We're going to ask him what his view was on these issues. We expect we'll be able to ask them, we hope; but it's just to say that if the answer is we're invoking

privilege -- all this is at issue because of the abuse of process claim -- we're going to sadly be back on another order to show cause. It's just by the way of heads-up. We're not looking for any relief.

THE COURT: That's this Friday.

MR. SHECHTMAN: That's this Friday.

THE COURT: Is this going to be an issue, Mr. Beigel?

MR. BEIGEL: I don't even understand what's going on here. It seems to me you have enough to do than taking up time thinking about things when there's no request for relief.

There's going to be an issue with respect to attorney-client privilege as to any counsel for CVR or the Icahn parties other than the one that we voluntarily stipulated could be disclosed. There's no secret that we will continue to assert the attorney-client privilege with respect to other attorneys. If they think that's improper, they could have brought, sought relief from you ahead of time. There's no secret, there's not going to be any surprise. So to say -- for Mr. Shechtman to stand up today, there's no papers; and to say I'll be back to see you, I don't know what that means.

THE COURT: Who's this lawyer that you're going to be deposing?

Proceedings

MR. SHECHTMAN: Mr. Gross.

MR. BEIGEL: The general counsel. He will testify.

THE COURT: The current general counsel of CVR?

MR. BEIGEL: Yeah. He's not going to testify to legal advice he gave to his client, which is CVR. He will testify to the matters we stipulated to with respect to another law firm. So for Mr. Shechtman to say, oh, in case Mr. Beigel objects on privilege, we'll be back here, fine, he can come back here with another order to show cause whenever he wants; but I don't know what he's asking today. It sounds like nothing.

MR. SHECHTMAN: Not, not much.

THE COURT: I don't think he's asking anything either.

MR. BEIGEL: He's just giving you a heads-up.

THE COURT: He's just giving me a heads-up.

MR. BEIGEL: Well, okay. I think you're busy received enough that you don't need heads-up.

THE COURT: Hopefully, you guys won't have to have me involved in that.

MR. SHECHTMAN: Pleasure, sir. Thank you.

(Whereupon, the matter concluded.)

* * *

C E R T I F I C A T E

JEANETTE LAKE-MASON, CSR, RMR, Official Court Reporter

Proceedings

This is certified to be a true and accurate transcription of the stenographic minutes taken in the above proceedings.

Jeanette Lake-Mason

JEANETTE LAKE-MASON, CSR,RMR
Official Court Reporter

ZUCKERMAN SPAEDER LLP

399 PARK AVENUE 14TH FLOOR
NEW YORK, NY 10022-4614
212.704.9600 212.704.4256 fax www.zuckerman.com

PAUL SHECHTMAN
Partner
646-746-8657
PShechtman@zuckerman.com

VIA ECF & FEDEX

January 22, 2015

Honorable O. Peter Sherwood
Supreme Court of the State of New York
County of New York
60 Centre Street, Part 49, Room 252
New York, NY 10007

Re: Wachtell, Lipton, Rosen & Katz v. CVR Energy, Inc., et al.
Index No. 654343/2013

Dear Justice Sherwood:

We write to provide supplemental information on three issues raised during the January 13 argument on Wachtell Lipton's collateral estoppel motion that are not related to the merits of the motion and therefore were not treated in the parties' briefs.

(1) Timing of CVR's Appeal in the Bank Action. The Court inquired as to the likely time for decision of an appeal in the Bank Action. Tr. 6. Summary judgment was entered in that Action more than four months ago, and CVR says that it intends to perfect its appeal on February 20, 2015. Tr. 6. If the banks file responsive briefs within 30 days, oral argument on the appeal would take place in the May Term. *See 2015 Calendar*, Appellate Division — First Department. Consistent with customary practice, however, it is likely that the banks will request and receive an extension in the briefing date. Tr. 6 (CVR's counsel noting the possibility of an extension); 22 NYCRR § 600.11(g) (providing that one adjournment is granted as a matter of course but precluding adjournments to the June Term). In that probable scenario, the appeal would be held over until the September Term, with argument between September 8, 2015 and October 1, 2015.

CVR's potential appeal will thus be argued at the earliest in the May Term and more likely in the September Term. As CVR recognizes, the First Department typically takes three months from argument to render its decisions. Tr. 6. Accordingly, the likely window for resolution of a CVR appeal would be August 2015 to, more probably, December 2015. *See* Jacquelyn Mouquin, *New York State Appellate Division, First Department: Unraveling the Term Calendar*, APPELLATE LAW JOURNAL, at 2 (May 2014) (litigants desiring a decision by year-end should bring their appeal before the September Term).

(2) Impact of this Court's Ruling on the SDNY Action. The Court inquired as to the relationship of the pending motion and the federal court proceedings. Tr. 11. As we indicated at argument, if the Court rules that CVR's claims are collaterally estopped, Wachtell Lipton would promptly move to dismiss CVR's federal action under *res judicata*. Where, as here, a "complaint in federal court is identical to [a] complaint in the New York Supreme Court" and the New York court determines that the state complaint is barred on preclusion grounds, the "decision of the New York State Supreme Court itself creates a preclusive effect" requiring dismissal of the federal complaint. *Hameed* v. *Aldana*, 296 F. App'x 154, 155 (2d Cir. 2008). A prompt ruling to that effect is sure to follow given Judge Sullivan's rapid adjudication of all motions to date.

(3) Costs of Litigation Pending Resolution of the Motion. The Court inquired as to whether its decision on the collateral estoppel motion would reduce litigation costs. Tr. 29. Review of the scheduling orders in this Action and the SDNY action confirm that the answer is yes. Fact discovery in both actions will continue until February 26. Plaintiff intends to depose two party witnesses and three non-party witnesses in that period. Of those five depositions, three will be no longer necessary and will be cancelled in the event the Court finds CVR's counterclaim is estopped. Defendants have noticed four depositions in that period, at least two of which would no longer be necessary in the event CVR's counterclaim is dismissed. Expert disclosure in both actions will take place between February 26 and April 27. Both parties intend to engage at least one expert with respect to CVR's counterclaim. Thus, a finding of collateral estoppel would eliminate the need for five of nine depositions, reduce the scope of the remaining four, and eliminate the need for this costly expert discovery.

Summary judgment motions are due on June 8, 2015. The substantial time and expense of these motions will be avoided if this Court rules now. Furthermore, absent a ruling on this collateral estoppel motion, Wachtell Lipton will be required to present the same collateral estoppel argument to both courts on summary judgment.

We hope this information is helpful to the Court.

Respectfully submitted,

P. Shechtman /mg

Paul Shechtman

PS:wr

cc: Herbert Beigel, Esq. (via e-mail)
Robert R. Viducich, Esq. (via e-mail)

LAW OFFICES OF
HERBERT BEIGEL

38327 S. Arroyo Way
Tucson, Arizona 85739

Office: 520-825-1995
Cellular: 520-869-5836
Facsimile: 520-844-6215
E-mail: hbeigel@gmail.com

767 Fifth Avenue #4700
New York, New York 10153

Herbert Beigel admitted:
Arizona, New York
District of Columbia
Illinois

January 22, 2015

Via NYSCEF and FedEx

Honorable O. Peter Sherwood
New York State Supreme Court
Commercial Division
60 Centre Street, Room 252
New York, New York 10007

Re: *Wachtell, Lipton, Rosen & Katz v. CVR Energy, Inc. et al*
(Index No. 654343/2013)

Dear Justice Sherwood:

I am responding to the letter of this date sent by counsel for plaintiff, Wachtell, Lipton, Rosen & Katz ("Wachtell").

As the Court is well aware, counsel for the parties had an extensive dialogue with Your Honor on the very scheduling matters discussed in Wachtell's letter. Therefore, Wachtell's letter, in my view, is nothing more than a continued (and otherwise improper) plea that this Court should quickly decide the pending motion to dismiss, a motion that Wachtell apparently assumes is unquestionably meritorious – an assumption with which CVR obviously disagrees, for all the reasons set forth in its opposition brief and at the hearing on January 14, 2014.

Furthermore, I believe Wachtell's persistence in pressing this Court to rush to judgment in the face of a properly first-filed federal lawsuit (which Judge Sullivan rightly refused to dismiss) is but another example of Wachtell's gamesmanship and should not be countenanced. Moreover, as Your Honor is aware, Wachtell never requested a stay of any discovery, and, indeed, insisted on moving forward with discovery, including insisting at great expense that CVR produce millions of pages of documents and provide extensive deposition testimony, which now Wachtell says was unnecessary.[1]

[1] We also find it presumptuous for Wachtell to assume that the banks will request an extension of the appeal's briefing schedule given that the banks were the ones who requested that we agree to perfect our appeal early (that is, by February 20). Worse still, it is ironic, if not inappropriate, for Wachtell to be seeking a rush to judgment based on future anticipated costs after causing CVR to unnecessarily incur significant costs in discovery here – and after receiving a $6 million fee from CVR for services that CVR alleges was flawed and caused it many more millions of dollars in damages.

CVR is entitled to a fair adjudication of its malpractice claim and, consistent with that belief, we respectfully urge Your Honor to defer ruling on Wachtell's motion (one way or the other) so as to allow Judge Sullivan to consider the merits of Wachtell's identical defenses, which are included in its responsive pleading to the federal malpractice claim.

Respectfully,

/s/ Herbert Beigel

cc: All counsel of record